SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 186

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ALBERT FRIED

No. 187

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

BENJAMIN EINHORN

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 73876

ALBERT FRIED, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:

For Petitioner: I. M. Pogash, C. P. A.

For Respondent: H. F. Morton, Esq., T. M. Mather, Esq., John T. Koehler, Esq.

Docket entries

1933

Sept. 29—Petition received and filed. Taxpayer notified. (Fee paid.)

Sept. 29—Copy of petition served on general counsel.

Oct. 27—Answer filed by general counsel.

Nov. 6—Copy of answer served on taxpayer.

1934

Jan. 20—Hearing set February 28, 1934.

Feb. 27—Order of continuance to March 12, 1934, for hearing on the merits entered.

Mar. 12—Hearing had before Mr. Arundell on merits—submitted. Dockets 73876 and 73877 consolidated for hearing and report. Stipulation of facts filed. Brief of petitioner due April 12, 1934—respondent's brief due April 27, 1934—petitioner's reply on May 7, 1934.

Mar. 16—Transcript of hearing of March 12, 1934, filed.

Apr. 12—Brief filed by taxpayer. April 12, 1934, copy served on general counsel.

2 May 2—Motion for extension to May 4, 1934, to file brief, brief lodged, filed by general counsel. May 4, 1934, granted.

May 16—Motion for extension to May 22, 1934, to file reply brief filed by taxpayer. May 17, 1934, denied.

Nov. 21—Findings of fact and opinion rendered—C. R. Arundell, Division 7. Decision will be entered for respondent.

Nov. 28—Decision entered—Mr. Arundell, Division 7.

1935

Feb. 27—Petition for review by United States Circuit Court of Appeals (Second) with assignments of error filed by taxpayer—affidavit of service thereon.

Feb. 27—Praecipe filed—affidavit of service thereon.

Before United States Board of Tax Appeals

Docket No. 73877

BENJAMIN EINHORN, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances:

For Petitioner: I. M. Pogash, C. P. A.

For Respondent: H. F. Morton, Esq., T. M. Mather, Esq., John T. Koehler, Esq.

Docket entries

1933

Sept. 29—Petition received and filed. Taxpayer notified. (Fee paid.)

3 Sept. 29—Copy of petition served on General Counsel.

Oct. 27—Answer filed by General Counsel.

Nov. 6—Copy of answer served on taxpayer.

1934

Jan. 20—Hearing set February 28, 1934.

Feb. 27—Order of continuance to March 12, 1934, for hearing on the merits entered.

Mar. 12—Hearing had before Mr. Arundell on merits—submitted. Dockets 73,876 and 73,877 consolidated for hearing and report. Stipulation of facts filed. Petitioner's brief due April 12, 1934—respondent's brief due April 27, 1934—petitioner's reply May 7, 1934.

Mar. 16—Transcript of hearing of March 12, 1934 filed.

Apr. 12—Brief filed by taxpayer. April 12, 1934, copy served on General Counsel.

May 2—Motion for extension to May 4, 1934 to file brief, brief lodged, filed by General Counsel. May 4, 1934 granted.

May 16—Motion for extension to May 22, 1934, to file reply brief filed by taxpayer. May 17, 1934, denied.

Nov. 21—Findings of fact and opinion rendered—C. R. Arundell, Division 7. Decision will be entered for respondent.

Dec. 3—Decision entered—C. R. Arundell, Division 7.

1935

Feb. 27—Petition for review by United States Circuit Court of Appeals (Second) with assignments of error filed by taxpayer—affidavit of service thereon.

Feb. 27—Praecipe filed—affidavit of service thereon.

4 Before United States Board of Tax Appeals

[Title omitted.]

Petition, No. 73876

Filed Sept. 29, 1933

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT-AR-A-1-MGC-60D) dated August 1, 1933, and as a basis of his proceedings alleges as follows:

1. The petitioner is an individual and his address is 120 Broadway, New York City.

2. The notice of deficiency, a copy of which is attached herewith, was mailed to the petitioner on August 1, 1933.

3. The taxes in controversy are income taxes for the year 1931. The deficiency asserted is $14,238.88, of which $13,213.66 is in controversy.

4. The determination of the tax set forth in said notice of deficiency is based on the following errors:

5 a. The Commissioner erred in determining the income of the petitioner from the partnership of Albert Fried & Company.

b. The error resulted from the fact that the Commissioner classified the partnership of Albert Fried & Company, hereafter referred to as the partnership, as traders, instead of dealers in securities.

c. The Commissioner, as a result of his classification, valued the securities owned by the partnership at January 31, 1931, the end of its fiscal year, at $395,973.47, using cost as the basis, instead of valuing these securities at $335,306, using market price as the basis.

d. By using the cost basis, the Commissioner erroneously increased the partnership income by $60,667.47.

e. If the Commissioner's classification is correct, then he erred in valuing the securities owned by the partnership at the beginning of its fiscal year ended January 31, 1931, at market price and the securities on hand at the end of said year at cost.

5. The facts upon which the petitioner relies are as follows:

a. The petitioner was a partner in the firm of Albert Fried & Company, located at 120 Broadway, New York City.

b. The members of the partnership were the petitioner, whose share of the partnership profits was 95%, and Benjamin Einhorn, whose share was 5%.

6 c. The partnership was a member of the New York Stock Exchange, each of the partners having a membership in the Exchange.

d. The partnership was a specialist in thirteen stocks traded in on the New York Stock Exchange, and it was the sole specialist in these stocks.

e. The partnership's income was from commissions from brokers and profits on sale of securities, both earned chiefly on the thirteen stocks in which it specialized.

f. A specialist is a qualified member of the New York Stock Exchange who receives orders in selected securities from other members for execution. For executing these orders, the specialist receives a commission.

g. A specialist does not have a monopoly or exclusive grant from the Exchange. He is subject to competition from other members, who may, if they choose, compete with him in dealing in the stocks in which he specializes.

h. The partnership in order to keep its patronage maintained fair and ready markets in the stocks in which it specialized. The partnership always either had stocks on hand to fill buy orders or was in a position to buy stocks to fill sell orders.

i. The partnership was a merchant dealing in the stocks in which it specialized.

7 j. The partnership was regularly engaged in buying and selling these stocks.

k. The partnership's customers were all the members of the New York Stock Exchange or the principals, wherever located, for whom the Exchange members acted.

l. The partnership's established place of business for dealing in the stocks was its post on the floor of the New York Stock Exchange.

m. The securities owned by the partnership at January 31, 1931, the end of the its fiscal year, had a market value of $335,306 and cost value of $395,973.47.

n. The securities owned by the partnership at February 1, 1930, the beginning of its fiscal year, had a market value of $1,190,557.50, and a cost value of $1,204,171.

o. The partnership, in its books of account, regularly inventoried its securities on hand at market price and made its tax returns on the same basis. The returns were audited annually and accepted by the Commissioner.

6. Wherefore, the petitioner prays that this Board may hear the proceedings and determine:

a. That the partnership of Albert Fried & Company should be classified as dealers in securities.

b. That, as dealers, the securities owned by the partnership at the beginning and at the end of its fiscal year should be inventoried at market price.

8 c. That the deficiency due from the petitioner shall not exceed $1,025.22.

d. Or determining that the partnership was not a dealer in securities; that the securities owned by the partnership at the beginning of its fiscal year ended January 31, 1931, should be valued at cost price.

e. That determining the partnership was not a dealer in securities the deficiency due from the petitioner shall not exceed $11,005.67.

ISRAEL M. POGASH,
Counsel for Petitioner,
17 Academy Street, Newark, N J.

[*Duly sworn to by Albert Fried; jurat omitted in printing.*]

9 *Exhibit to petition*

NP-2-28

TREASURY DEPARTMENT,
Washington, Aug. 1, 1933.

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to IT:AR:A-1—MGC-60D.

Mr. ALBERT FRIED,
120 Broadway, New York, New York.

SIR: You are advised that the determination of your tax liability for the year 1931 discloses a deficiency of $14,238.88, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the inclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of
10 IT:C:P-7. The signing of this form will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed form, or on the date assessment is made, whichever is earlier; whereas if this form is not filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Signed) CHAS. T. RUSSELL,
Deputy Commissioner.

Inclosures:
Statement
Form 870
OS-2

Statement

IT:AR:A–1
MGC–60D

In re: Mr. Albert Fried, 120 Broadway, New York, New York

Income Tax Liability

Year	Income tax liability	Income tax assessed	Deficiency
1931	$17,129.39	$2,890.51	$14,238.88

11 Reference is made to the report dated September 30, 1932, prepared by Revenue Agent Frank A. Harder, transmitted to you under date of November 19, 1932, and to your protest submitted under date of December 2, 1932.

Careful consideration has been accorded your protest in connection with the findings of the agent and the report on the conference held with you on March 29, 1933, in the office of the agent in charge, as well as to the data submitted at a conference held in this office with you on June 12, 1933, and the additional information received on July 10, 1933. The adjustments recommended by the agent have been approved in this office.

Your contention that the firm of Albert Fried and Company, a brokerage partnership of which you are a member, is entitled to inventory stock on the basis of being a dealer in securities has been denied for the reason that no evidence has been submitted which would indicate that the firm could qualify as a dealer in securities.

The evidence now before the Bureau indicates that the firm is in the business of stock brokers, classified as specialists in certain securities on the New York Stock Exchange.

Article 105 of Regulations 74 deals with the subject of inventories by dealers in securities and reads in part as follows:

"* * * For the purpose of this rule a dealer in securities is a merchant of securities * * * regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom. * * *"

12 In view of the foregoing, it is held that the firm of Albert Fried and Company is not a merchant of securities with respect to the stock dealt in as a specialist, and, therefore, does not qualify as a dealer in securities with respect to the stock which it seeks to inventory.

Net income shown in return	$51,003.92
Add:	
1. Partnership income	66,146.09
2. Dividends	3,515.00
Total	120,665.01
Less:	
3. Other deductions	5,000.00
Adjusted net income	115,665.01

Explanation of Changes

1 and 2. An examination of the books of account and records of Albert Fried and Company disclosed that your partnership income and dividends received from this source were $197,571.04 and $50,073.55 instead of $131,424.95 and $46,558.55 as reported by you.

3. The item of $5,000.00 representing a legal fee in connection with a suit by the Niagara Shares Corporation of Delaware against the Lincoln Interstate Holding Company previously deducted by Albert Fried and Company has been transferred to your return as being a personal expense.

13

Computation of Tax

Income subject to surtax		$115,665.01
Less:		
Dividends	$50,212.20	
Personal exemption and credit for dependents	4,700.00	
		54,912.20
Balance subject to normal tax		$60,752.81
Normal tax at 1½% on $4,000.00		$60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $52,752.81		2,637.64
Surtax on $115,665.01		14,793.00
Total		$17,610.64
Less:		
Credit for earned net income of $30,000.00		481.25
Total income tax assessable		$17,129.39
Income tax previously assessed		2,890.51
Deficiency in tax		$14,238.88

Fiscal year income from partnership ended January 31, 1931. Rates for the years 1930 and 1931 are the same.

A copy of this letter has been transmitted to your attorney, Mr. Israel M. Pogash, 17 Academy Street, Newark, New Jersey, who has on file in this office a duly recorded power of attorney.

OS-2

14

Before United States Board of Tax Appeals

[Title omitted.]

Answer, No. 73876

Filed Oct. 27, 1933

The Commissioner of Internal Revenue by his attorney, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4–(a) to (e) incl. Denies that the Commissioner erred in the determination of the deficiency as alleged in sub-divisions (a) to (e) inclusive, of paragraph 4 of the petition.

5–(a) and (b). Admits the allegations contained in sub-divisions (a) and (b) of paragraph 5 of the petition.

5–(c) to (o) incl. Denies the allegations set forth in sub-divisions (c) to (o) inclusive, of paragraph 5 of the petition.

15 6. Denies generally and specifically each and every allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

E. Barrett Prettyman,
(Signed) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
R. H. TRANSUE,
Special Attorney,
Bureau of Internal Revenue.
RHT/mjc-10-26-33

Before United States Board of Tax Appeals

[Title omitted.]

Petition, No. 73877

Filed Sept. 29, 1933

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal
16 Revenue in his notice of deficiency (IT–AR–A–1–MGC–60D) dated August 1, 1933, and as a basis of his proceedings alleges as follows:

1. The petitioner is an individual and his address is 120 Broadway, New York City.

2. The notice of deficiency, a copy of which is attached herewith, was mailed to the petitioner on August 1, 1933.

3. The taxes in controversy are income taxes for the year 1931. The deficiency asserted is $77.82 of which $56.24 is in controversy.

4. The determination of the tax set forth in said notice of deficiency is based on the following errors:

a. The Commissioner erred in determining the income of the petitioner from the partnership of Albert Fried & Company.

b. The error resulted from the fact that the Commissioner classified the partnership of Albert Fried & Company, hereafter referred to as the partnership, as traders, instead of dealers in securities.

c. The Commissioner, as a result of his classification, valued the securities owned by the partnership at January 31, 1931, the end of

its fiscal year, at $395,973.47, using cost as the basis, instead of valuing these securities at $335,306, using market price as the basis.

17 d. By using the cost basis, the Commissioner erroneously increased the partnership income by $60,667.47.

e. If the Commissioner's classification is correct, then he erred in valuing the securities owned by the partnership at the beginning of its fiscal year ended January 31, 1931, at market price and the securities on hand at the end of said year at cost.

5. The facts upon which the petitioner relies are as follows:

a. The petitioner was a partner in the firm of Albert Fried & Company, located at 120 Broadway, New York City.

b. The members of the partnership were the petitioner, whose share of the partnership profits was 5% and Albert Fried, whose share of the profits was 95%.

c. The partnership was a member of the New York Stock Exchange, each of the partners having a membership in the Exchange.

d. The partnership was a specialist in thirteen stocks traded in on the New York Stock Exchange, and it was the sole specialist in these stocks.

e. The partnership's income was from commissions from brokers and profits on sale of securities, both earned chiefly on the thirteen stocks in which it specialized.

18 f. A specialist is a qualified member of the New York Stock Exchange who receives orders in selected securities from other members for execution. For executing these orders, the specialist receives a commission.

g. A specialist does not have a monopoly or exclusive grant from the Exchange. He is subject to competition from other members, who may, if they choose, compete with him in dealing in the stocks in which he specializes.

h. The partnership in order to keep its patronage maintained fair and ready markets in the stocks in which it specialized. The partnership always either had stocks on hand to fill buy orders or was in a position to buy stocks to fill sell orders.

i. The partnership was a merchant dealing in the stocks in which it specialized.

j. The partnership was regularly engaged in buying and selling these stocks.

k. The partnership's customers were all the members of the New York Stock Exchange or the principals, wherever located, for whom the Exchange members acted.

l. The partnership's established place of business for dealing in the stocks was its post on the floor of the New York Stock Exchange.

19 m. The securities owned by the partnership at January 31, 1931, the end of its fiscal year, had a market value of $335,306 and cost value of $395,973.47.

n. The securities owned by the partnership at February 1, 1930, the beginning of its fiscal year, had a market value of $1,190,557.50, and a cost value of $1,204,171.

o. The partnership, in its books of account, regularly inventoried its securities on hand at market price and made its tax returns on the same basis. The returns were audited annually and accepted by the Commissioner.

6. Wherefore, the petitioner prays that this Board may hear the proceedings and determine:

a. That the partnership of Albert Fried & Company should be classified as dealers in securities.

b. That, as dealers, the securities owned by the partnership at the beginning and at the end of its fiscal year should be inventoried at market price.

c. That the deficiency due from the petitioner shall not exceed $21.68.

d. Or determining that the partnership was not a dealer in securities that the securities owned by the partnership at the be-
20 ginning of its fiscal year ended January 31, 1931, should be valued at cost price.

e. That determining the partnership was not a dealer in securities the deficiency due from the petitioner shall not exceed $50.61.

ISRAEL M. POGASH,
Counsel for Petitioner,
17 Academy Street, Newark, N. J.

[Duly sworn to by Benjamin Einhorn; jurat omitted in printing.]

21 *Exhibit to petition*

NP-2-28

TREASURY DEPARTMENT,
Washington, Aug. 1, 1933.

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to IT:AR:A-1—MGC-60D.

Mr. BENJAMIN EINHORN,
% Albert Fried and Company,
120 Broadway, New York, New York.

SIR: You are advised that the determination of your tax liability for the year 1931 discloses a deficiency of $77.82, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the inclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of
22 IT:C:P-7. The signing of this form will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed form, or on the date assessment is made, whichever is earlier; whereas if this form is not filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Signed) CHAS. T. RUSSELL,
Deputy Commissioner.

Inclosures:
Statement.
Form 870.
OS-2.

Statement

IT:AR:A-1
MGC-60D

In re Mr. Benjamin Einhorn, % Albert Fried and Company, 120 Broadway, New York, New York

Income Tax Liability

Year	Income tax liability	Income tax assessed	Deficiency
1931	$94.59	$16.77	$77.82

Reference is made to the report dated September 30, 1932,
23. prepared by Revenue Agent Frank A. Harder, transmitted to you under date of November 19, 1932, and to your protest submitted under date of December 2, 1932.

Careful consideration has been accorded your protest in connection with the agent's findings and the report on the conference held with your partner, Mr. Albert Fried, on March 29, 1933, in the office of the agent in charge, as well as to the additional information which was considered at a conference held in this office on June 12, 1933, and the data received on July 10, 1933.

Your contention that the firm of Albert Fried and Company, a brokerage partnership of which you are a member, is entitled to inventory stock on the basis of being a dealer in securities has been denied for the reason that no evidence has been submitted which would indicate that the firm has qualified as a dealer.

Article 105 of Regulations 74 relating to the income tax under the Revenue Act of 1928 deals with the subject of inventories by dealers in securities and reads in part as follows:

"* * * For the purpose of this rule a dealer in securities is a merchant of securities * * * regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom. * * *"

In view of the foregoing, it is held that the firm of Albert Fried and Company is not a merchant of securities with respect to
24 the stock dealt in as a specialist, and, therefore, does not qualify as a dealer in securities with respect to the stock which it seeks to inventory.

Net income shown in return	$7,440.87
Add:	
1. Partnership income increased	3,481.38
Dividends increased	185.00
Adjusted net income	$11,107.25

Explanation of Adjustments

1 and 2. An examination of the books of account and records of Albert Fried and Company disclosed that your partnership income and dividends from this source were $8,951.87 and $2,635.45, respectively, instead of $5,470.49 and $2,450.45, as reported.

Computation of Tax

Net income subject to surtax		$11,107.25
Less:		
Dividends	$2,635.45	
Personal exemption and credit for dependent	3,500.00	
		6,135.45
Balance subject to normal tax		$4,971.80
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on $971.80		29.15
Surtax on $11,107.25		11.07
Total		$100.22
25 Less:		
Credit for earned net income of $5,000.00		5.63
Income tax assessable		94.59
Income tax previously assessed		16.77
Deficiency		77.82

Fiscal year income from partnership ended January 31, 1931. Rates for the years 1930 and 1931 are the same.

A copy of this letter has been transmitted to your attorney, Mr. Israel M. Pogash, 17 Academy Street, Newark, New Jersey, who has on file in this office a duly recorded power of attorney.

OS-2

Before United States Board of Tax Appeals

[Title omitted.]

Answer, No. 73877

Filed Oct. 27, 1933

The Commissioner of Internal Revenue by his attorney, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, for
26 answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4-(a) to (e) incl. Denies that the Commissioner erred in the determination of the deficiency as alleged in sub-divisions (a) to (e) inclusive, of paragraph 4 of the petition.

5-(a) and (b). Admits the allegations contained in sub-divisions (a) and (b) of paragraph 5 of the petition.

5-(c) to (o) incl. Denies the allegations set forth in sub-divisions (c) to (o), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

E. Barrett Prettyman,
(Signed) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

R. H. TRANSUE,
Special Attorney,
Bureau of Internal Revenue.

RHT/mjc-10-26-33

27 Before United States Board of Tax Appeals

[Title omitted.]

Stipulation of facts

Filed March 12, 1934

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective counsel, that the following facts may be taken and regarded as true, the same as if said facts had been proved by competent evidence introduced at the hearing of these appeals:

1. The single issue is whether petitioners as a partnership known as Albert Fried & Company were dealers in securities in which they specialize under Article 105, Regulations 74, Revenue Act of
28 1924, and therefore were entitled to inventory such securities at the end of the fiscal year at market value.

2. The co-partnership of Albert Fried & Company is composed of the following members: Albert Fried and Benjamin Einhorn, the petitioners above named. Albert Fried has a 95% interest and Benjamin Einhorn a 5% interest in the profits of the partnership.

3. The partnership was organized in March 1929 and has maintained offices, and at present is conducting its business at No. 120 Broadway, Borough of Manhattan, City of New York, State of New York.

4. The firm is a member of the New York Stock Exchange and each of the partners owns a membership on the Exchange and is subject to all the rules and regulations of the New York Stock Exchange.

5. The firm is a specialist in the following thirteen stocks traded in on the Exchange:

Northern Pacific Railway, common stock.
Air Reduction Co., common stock.
United Carbon Co., common stock.
American Zinc & Lead Smelting & Refining Co., common stock.
American Zinc & Lead Smelting & Refining Co., preferred stock.
Davega Stores Co., common stock.
A. Hollander & Sons, common stock.
Minnesota Moline Power Implement Co., common stock.
Minnesota Moline Power Implement Co., preferred stock.
Poor & Co. common stock.
29 Sterling Securities Co., A stock.
Sterling Securities Co., preference preferred.
Sterling Securities Co., convertible preferred.

6. A specialist on the New York Stock Exchange is a qualified member who accepts orders in selected securities from other members for execution.

7. The firm as a specialist filled such orders by either buying or selling its own securities or by matching like orders of a buyer and seller.

8. In addition to buying and selling for its own account the thirteen stocks in which it specialized and executing orders for these stocks for other members of the Stock Exchange for commissions, the firm's activities also included the purchase and sale of other stocks listed on the Exchange for its own account.

9. The firm leased space on the floor of the Exchange where it transacted its business in the thirteen stocks in which it specialized. The annual rental for this space is $2,000.00.

10. The firm held itself out generally and was known to all of the members of the Exchange as the specialist in these thirteen stocks,

and it was regularly and consistently engaged in the purchase and resale of such securities.

11. As business is transacted on the New York Stock Exchange, it is the practice for a member who desires to buy or sell a stock to place his order with the specialist in that stock.

12. The firm always had on hand the securities in which it specialized. Schedule 1 attached herewith shows the number of shares of these stocks owned by the firm at the end of each month in the year under review. As shown in this schedule, the shares carried ran from 10,300 shares at the end of one month to 62,300 at the end of another.

13. An analysis of a typical month's dealings in two of the stocks in which the firm specialized shows the following:

Security	Total no. of shares sold on N. Y. S. E. in one month	Of the total sales, A. F. & Co. sold	%
Air Reduction comm. st	126, 200	73, 700	59
Northern Pacific R. R. comm	328, 700	146, 700	45

Of the 126,200 shares of Air Reduction sold on the Exchange in one month, 59% was sold by the firm. Of a total of 328,700 shares of Northern Pacific sold on the Exchange in one month 45% represented shares sold by the firm.

14. Schedule 2 submitted herewith is a typical picture of the daily business done by the firm in the stocks in which it specializes.

15. All the stocks which the firm bought and sold were actually received and delivered by the firm.

16. The firm maintained an office at 120 Broadway, with a staff of eight people employed to receive and deliver securities and keep records in addition to the two partners.

17. For the year under review ending January 31st, 1931, the table below shows the volume of sales in shares and in dollars made by the firm:

31	No. of Shares	Amount
Sales of 13 stocks specialized in	1, 762, 100	$125, 232, 632. 36
Sales of other stocks	119, 600	5, 127, 471. 40
Total sales for year	1, 881, 700	$130, 360, 103. 76

18. The firm, ever since its inception, in its books of account regularly inventoried unsold securities on hand at market value, and in its tax returns computed its net income on the same basis.

19. On numerous occasions the partnership purchased and sold the securities in which it specializes in order to maintain fair and equitable markets and as far as possible tried to prevent wide fluctuation in such securities.

20. During the taxable year the partnership sold its thirteen securities to 431 customers, the sales ran from a minimum of 100 shares to a maximum of 5,700 shares. These customers were the other members of the Stock Exchange acting for themselves or for the principals for whom these members were acting as brokers.

(Sgd.) ISRAEL M. POGASH,
Counsel for Petitioners.

(Sgd.) ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.

Albert Fried & Company—Schedule 1

Number of Shares of the 13 Stocks Specialized in by the Firm, owned by the Firm at the end of each Month for the year Ended January 31, 1931:

Month—1930	*No. of Shares Owned*
February	47, 300
March	62, 300
April	39, 800
May	21, 600
June	18, 200
July	25, 300
August	32, 100
September	22, 900
October	23, 500
November	23, 300
December	10, 500
1931	
January	10, 300

Schedule 2

Albert Fried & Company

Schedule Showing a Day's Trading in United Carbon and Air Reduction

Two of the stocks in which the firm specializes:

	United Carbon		Air Reduction	
	No. shares	Price	No. shares	Price
On hand at beginning of day	100		1,700	
Purchases	300	17⅝	100	69¼
	400	17⅝	100	69½
	400	17⅝	100	68½
	400	17⅝	100	68½
	100	17⅝	100	68¼
	900	18	100	68½
	200	17⅝		
	100	18		
	100	16⅞		
	100	16⅞		
	100	17		
Total purchases	3,100		600	

	United Carbon		Air Reduction	
	No. shares	Price	No. shares	Price
Sales	200	18	200	69¾
	200	18	100	69⅞
	100	18	100	69⅞
	100	18	100	69½
	200	18⅛	100	69⅞
	100	17⅞	100	69⅞
	100	17⅞	1,000	69⅞
	200	17⅞	200	69⅞
	100	17⅞	100	69½
	100	17⅞	100	69⅞
	100	17⅞	100	69½
	500	17½	100	69¼
	100	17⅝	100	68
	100	17½	100	68¼
	100	17½		
	100	17⅞		
	200	17⅞		
	100	17⅞		
	100	17⅞		
	100	18⅜		
	100	18⅜		
	100	17⅞		
	100	17⅞		
Total sales	3,200		2,500	

34 Before United States Board of Tax Appeals

Docket No. 73876

ALBERT FRIED, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 73877

BENJAMIN EINHORN, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Findings of fact and opinion

Promulgated November 21, 1934

The firm of which petitioners were members is a specialist in a group of stocks traded in on the New York Stock Exchange. *Held* that the firm's transactions in such stocks were not such as to make it a dealer within the meaning of article 105, Regulations 74, and it is not entitled to inventory them in determining income.

Israel M. Pogash, C. P. A., for the Petitioners.

H. F. Morton, Esq., Thomas N. Mather, Esq., and John T. Koehler, Esq., for the Respondent.

35 These proceedings involve deficiencies in income taxes of the members of a partnership for the year 1931, as follows: Docket No. 73,876, Albert Fried, $14,238.88; Docket No. 73,877, Benjamin Einhorn, $77.82.

A stipulation filed at the hearing reads in part that:

"The single issue is whether petitioners as a partnership known as Albert Fried & Company were dealers in securities in which they specialized under Article 105, Regulations 74, Revenue Act of 1928, and therefore were entitled to inventory such securities at the end of the fiscal year at market value."

Findings of fact

Petitioners are members of the firm of Albert Fried & Co., a partnership organized in March 1929, petitioner Fried having a 95 percent interest and petitioner Einhorn a 5 percent interest.

Each of the partners owns a membership on the New York Stock Exchange. The firm is a specialist in 13 stocks traded in on the exchange. The firm filled orders for its specialties either by buying or selling its own securities or by matching like orders of a buyer and seller. Space was leased by the firm on the floor of the exchange, where it transacted its business in the 31 stocks in which it specialized. The annual rental for this space is $2,000. The firm held itself out generally and was known to all of the members of the ex-
36 change as the specialist in its 13 stocks, and it was regularly and consistently engaged in the purchase and resale of those stocks. As business is transacted on the New York Stock Exchange, it is the practice for a member who desires to sell or buy a particular stock to place his order with the specialist in that stock.

The firm always had on hand some of the securities in which it specialized. The number of shares on hand as tabulated at the end of each month during the fiscal year ended January 31, 1931, ranged from a low of 10,300 to a high of 62,300 shares. In a typical months' dealings the firm's sales of one of its specialties represented 59 percent of the total sales on the exchange in that stock, and in the case of another of its specialties its sales were 45 percent of the total number sold on the exchange. In a typical day's trading the firm had on hand 100 shares of one of its specialties at the beginning of the day; it made 11 purchases aggregating 3,100 shares, and 23 sales aggregating 3,200 shares. In the case of another of its specialties it started the day with 1,700 shares, made 6 purchases amounting to 600 shares and 14 sales totaling 2,500 shares. During the taxable year the firm sold its 13 specialties to 431 customers; the sales ran from a minimum of 100 shares to a maximum of 5,700 shares. The customers mentioned were other members of the exchange acting for themselves or as brokers.

In addition to buying and selling for its own account the 13 stocks in which it specialized, and executing orders for such stocks for other members of the exchange for commission, the firm's activities

37 included the purchase and sale for its own account of other stocks listed on the exchange. The firm's sale of its specialty stocks in the year ended January 31, 1931, amounted to $125,232,-632.36, represented by 1,762,100 shares; its sales of other stocks were in the amount of $5,127,471.40, the shares numbering 119,600. On numerous occasions the firm purchased and sold the shares in which it specialized in order to stabilize markets and as far as possible tried to prevent wide fluctuation in those stocks.

All the stocks which the firm bought and sold were actually received and delivered by it. The firm maintained an office at 120 Broadway, with a staff of eight people employed to receive and deliver securities and keep records. These eight employees were in addition to the two partners. Ever since its inception the firm has regularly inventoried in its books of account its unsold securities on hand at market value, and in its income tax returns it has computed its net income on the same basis.

Opinion

ARUNDELL: Petitioners concede that the firm of which they are members is not a dealer as to the stocks other than those in which it specializes. They claim that the firm is a "dealer in securities" as to the 13 specialty stocks within the meaning of article 105, Regulations 74, and consequently may inventory those stocks in computing income.

In a consideration of cases involving the question presented here it should be remembered that the taxing statute deals primarily
38 with realized gains or losses. Lucas v. American Code Co., 280 U. S. 445. In order for a taxpayer to use some other method of computing gain or loss he must show clearly that he comes within statutory provisions which allow a departure from the fundamental aim of the statute. If a departure is permissible here it is under section 22 (c) of the Revenue Act of 1928, reading as follows:

"Whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income."

The application of this section is, by its language, confined to rather narrow limits. It does not extend to all cases in which taxpayers think that income can be reflected on an inventory basis. Only in the class of cases where in the opinion of the Commissioner the use of inventories is necessary can the inventory method be used. We have heretofore had occasion to say that the inventory method of computing income "has always been regarded as special and as involving problems of general administration peculiarly cognizable by the Commissioner." Alfred E. Hamill, 30 B. T. A. 955. In that case, after quoting the statute as set out above, we further said:

39 "Fortified with such a clear sanction in the statutory grant of power, the administrative determination in such a case must survive all but the strongest attack. Short of being arbitrary or capricious or based on a clear demonstration of error, the determination in any single instance ought not to be disturbed. This is not a matter of jurisdiction, for the Board clearly has the power of review, Blair v. Oesterlein Machine Co., 275 U. S. 220, but is rather an attitude of the Board in the exercise of its jurisdiction not to interfere lightly with general administrative matters which the Congress has entrusted to the Comissioner's discretion." * * *

The question ultimately presented for decision here is whether the petitioners have made a strong enough case to show that the respondent erred in refusing to classify the firm as a dealer. The burden of so doing, we said in the Hamill case, is "undoubtedly heavier than that of overthrowing a purely factual determination upon which the ultimate determination must stand."

Petitioners say that their firm is a dealer within the following definition contained in article 105:

* * * "For the purpose of this rule a dealer in securities is a merchant of securities, whether an individual partnership, or corporation, with an established place of business, regularly engaged in the purchase of securities and their resale to customers; that
40 is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom."

In the case of James B. Lowell, 30 B. T. A. 1296, we had before us a specialist in three stocks traded in on the New York Stock Exchange. In our opinion in that case we said in part:

"Some of the transactions in these stocks consisted of matching purchase orders against sales orders, the orders on both sides of the book being received from brokers, and for this service a commission was paid by the brokers. It is obvious that in such transactions no securities would need be carried in stock if the buy and sell orders matched up evenly each day. To what extent they were even is not shown, but the testimony of petitioner James B. Lowell is that he endeavored to come out as nearly even as possible. Transactions of this kind, in our opinion, cannot be classified as the "purchase of securities and their resale to customers." Art. 105, Regulations 74. The petitioner in such case was not selling securities previously purchased, but was rather acting as a broker on a commission basis. A dealer or merchant gains or loses directly in proportion to fluctuations in the market price of the commodity in which he deals; not so with petitioners in their matching operations, for no matter how much the spread in prices their commission was the same on each 100-share lot cleared on their books.

41 "The other transactions in the specialty stocks were not such as to come within the generally accepted understanding of the terms of merchant or dealer. They were purchases or sales, sometimes short sales, made when there were no matching orders on the

books. These transactions, according to the testimony, were for the purpose of creating or maintaining a market; they were speculative, as explained by the witness, in that he was betting on a rise or fall in the market according to whether he was long or short of the stock. An effort was made to even up on each transaction within the day though this was not always accomplished. These transactions were engaged in to maintain the market only for the day; they were engaged in on margin with Wrenn Brothers; no certificates were issued in the names of petitioners or the partnership; and neither the petitioners nor their partnership could deal directly with the public. These matters demonstrate the width of the gap between the petitioners and a dealer or merchant, who is generally understood to be one who carries a stock of his wares and stands ready to deal directly with all who wish to trade in that commodity." * * *

The essential in the Lowell case and these are the same, and what we said in the former case controls our decision here. The facts in the instant case were stipulated and the stipulation omits some of the detailed evidence presented in the Lowell case as to the oper-
42 ating methods of specialists on the stock exchange. But this lack of evidence may not be availed of by petitioners, for on them rests the burden of overcoming the prima facie correctness of the respondent's determination. Their claim is that the activities of the firm as a specialist bring it within the definition of a dealer, without describing the operating methods of the specialist or even explaining the specialist's function. When we refer to the reported cases, the descriptions given of the activities and operating methods of specialists fall far short of bringing them within the meaning of "dealers" as defined by article 105. See James B. Lowell, supra; People v. Goldfogle, 213 App. Div. 702; 211 N. Y. 107.[1]

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[1] [People *v.* Goldfogle, supra.] * * * The "specialist" is a floor broker, who undertakes to specialize in a limited group of stocks, and a firm conducting a "specialist" business is one which is represented by one or more such floor brokers. For the convenience of brokers and to expedite the execution of orders, all the stocks listed on the Stock Exchange are around different "posts" located on the floor. * * *

The specialist stations himself at one of the posts on the floor, where he remains from 10 a. m. to 3 p. m., accepting orders coming from other Stock Exchange members in the stocks listed at his post. He is always at his post, and the orders he receives are usually those impossible of execution at the time they are given out, but which come into force as the market advances or declines. The necessity for specialists arises from the rigid responsibility to which Stock Exchange members are held for the execution of orders when market conditions permit. At times, great loss would result to brokers doing business around the room, unless they could pass this responsibility on to the specialist.

When a specialist accepts an order from another member, he assumes responsibilities and liabilities which are recognized and ruled upon by the governors of the Exchange under the rules of the Exchange. In some cases, the specialist, when he buys and sells for a Stock Exchange house, "gives up" on a transaction—i. e., discloses the name of his principal. These transactions are cleared and settled by the Stock Exchange firms for whom the purchases or sales are made, and the specialist neither makes payment for the securities bought nor receives payment for the securities sold. He remains liable as a principal, however, to the party to whom he sold or from whom he bought until the due date of the settlement of the contract, although he takes no further part in the handling of the details pending the closing of the contract. He is responsible for the carrying out of the contract. In many cases, the specialist does not disclose the name of his principal, but gives either his own name or the name of the firm with which he is associated, in which case his liability remains as above. In a few cases a specialist may avoid liability where he specifically states at the time of the purchase or sale that he is buying or selling for the account of some other broker. The other broker then becomes liable, and the specialist steps out. Such a case is exceptional; as a general rule the specialist remains liable.

* * * * * * *

The specialist who executes orders received from other members of the Stock Exchange receives a certain proportion of the commission paid to the other Stock Exchange members by their customers; for instance, where stock has a par value of $100, the broker's commission is $15 per 100 shares. Of this $15, the specialist receives $2.50.

43 Referring to some of the confused facts stipulated, it is set forth in the stipulation that the firm always had on hand some of the securities in which it specialized. This, standing alone, is incomplete and possibly misleading, for it is a matter of general knowledge and is indicated by the cases above that it is neither the function nor aim of a specialist to carry on hand at all times a sufficiently large stock of his specialty stocks to meet all demands. His ability to supply the demand depends largely on his ability to match orders rather than upon the quantity of stock on hand. Again, there is a reference in the stipulation to the firm's buying and selling "for its own account." The statement is not explained. If such transactions were for investment or speculation they are outside the activities of a dealer. See Adirondack Securities Corporation, 23 B. T. A. 61; Northeastern Surety Co., 29 B. T. A. 297. Moreover, under the rules of the stock exchange, a member while acting as broker,
44 whether specialist or otherwise, is prohibited, with certain specified exceptions, from buying or selling for his own account securities for which he has accepted orders to buy or sell. See Charles H. Meyer, The Law of Stock Brokers and Stock Exchanges, § 51.

It is unnecessary to consider whether other brokers with or through whom the firm dealt were "customers." That was the principal point involved in the Estate of Harry E. R. Hall, 29 B. T. A. 1255, upon which petitioners rely. Even if it be conceded that a broker may be a customer, it does not follow that every one with whom a broker deals is a dealer or merchant. One who is admittedly a broker, or a speculator, may have customers—indeed he must have in the sense of having some one to sell to—but that does not make him a merchant.

We are accordingly of the opinion, and so hold, that petitioners have not sustained the burden of establishing that the respondent erred in refusing to classify their firm as a dealer within the meaning of the regulations.

Reviewed by the Board.

Decision will be entered for the respondent.

MURDOCK concurs in the result.

Dissenting opinion

SMITH, dissenting: In Estate of Harry E. R. Hall, 29 B. T. A. 1255, we held that specialists on the New York Stock Exchange who were engaged in the business of buying securities and reselling them to customers, principally members of the New York Stock Exchange, were entitled under article 105 of Regulations 74 to compute
45 net income upon the basis of inventories at market. I think there are no material differences between the facts in this case and those which obtained in the above cited case. Furthermore, I am of the opinion that the petitioners here substantially met the

requirements of article 105 to qualify them as dealers in securities. They have an established place of business; they are regularly engaged in the purchase of securities and their resale to customers, and those purchases and sales are made with a view to the gains and profits that may be derived therefrom. If the regulation was intended to apply only to underwriters or distributors of securities that fact is not made plain by the terms of the regulation, nor can I understand why such merchants of securities should be favored by the respondent over brokers who make a practice of buying for their own account and selling to customers the securities thus bought with a view to gains and profits to be derived therefrom.

Substantially the question presented here was considered by the Circuit Court of Appeals for the Second Circuit in Harriman National Bank v. Commissioner, 43 Fed. (2d) 950. It was there held that a bank, maintaining a separate department for the buying and selling of securities, which sold securities when it thought the prices were reasonable, was a dealer in securities within the contemplation of article 1585 of Regulations 45, which corresponds with article 105 of Regulations 74.

As I see it, the only question which we have here is whether
46 the petitioners qualify as dealers in securities as defined in the regulation. I think they do.

BLACK, MCMAHON, and LEECH agree with this dissent.

Before United States Board of Tax Appeals, Washington

Docket No. 73876

ALBERT FRIED, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the determination of the Board, as set forth in its report promulgated November 21, 1934, it is

Ordered and decided: There is a deficiency in income tax for the year 1931 in the amount of $14,238.88.

Enter.

Entered December 3, 1934.

[SEAL] (Signed) C. R. ARUNDELL,
Member.

Copies served on both parties.

47 Before United States Board of Tax Appeals, Washington

Docket No. 73877

BENJAMIN EINHORN, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Decision

Pursuant to the determination of the Board, as set forth in its report promulgated November 21, 1934, it is

Ordered and decided: That there is a deficiency in income tax for the year 1931 in the amount of $77.82.

Enter.

Entered November 28, 1934.

[SEAL]

(Signed) C. R. ARUNDELL,
Member.

Copies served on both parties.

48 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Petition for review

Filed Feb. 27, 1935

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now come Albert Fried and Benjamin Einhorn, the Taxpayers, by their attorney, Leo K. Martus, and respectfully show:

I

The petitioners on review (hereinafter referred to as the Taxpayers) are partners of the firm of Albert Fried & Company,
49 having their place of business at 120 Broadway, New York City, State of New York. The respondent on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States holding his office by virtue of the laws of the United States.

The income tax report for the taxable year 1931, being the taxable year involved herein, upon which a deficiency was determined, was filed with the United States Collector of Internal Revenue for the Second District of New York, and the office of said Collector is

located within the judicial Circuit of the United States Circuit Court of Appeals for the Second Circuit.

II

The Commissioner determined a deficiency in Federal income taxes against each of the Taxpayers for the year 1931 as follows:

Docket No. 73,876, Albert Fried	$14,238.88
Docket No. 73,877, Benjamin Einhorn	77.82

and in accordance with the provisions of Section 272 (Rev. Act 1928) sent to the Taxpayers notices of said deficiencies. Thereafter the Taxpayers duly filed an appeal from the said notices of deficiencies with the United States Board of Tax Appeals. The cases were consolidated for hearing and decision, and were submitted on a Stipulation of Facts. Petitioners and Respondent filed briefs on said appeal to the Board of Tax Appeals and the Board of Tax Appeals promulgated its opinion, and on November 28,
50 1934, duly entered its decision in docket No. 73,876 wherein and whereby the Board ordered and decided, by divided vote, four of the members of the Board dissenting, that there was a deficiency for the year 1931 of $14,238.88 against petitioner Albert Fried, and on December 3, 1934, duly entered its decision in docket No. 73,877 against petitioner Benjamin Einhorn in the sum of $77.82.

III

The deficiencies which were in controversy before the Board of Tax Appeals arose or resulted from the determination of the Commissioner that the Taxpayers as partners of the firm of Albert Fried & Company were not dealers in securities under Article 105, Regulation 74, Revenue Act of 1928.

IV

The Taxpayers say that in the record and proceedings before the Board of Tax Appeals in the opinion and decision rendered and entered by the Board manifest error occurred and intervened to the prejudice of the Taxpayers and the Taxpayers file the following errors, and each of them in which they aver occurred in the said record, proceedings, decision, and upon which they rely to reverse the said opinion and decision so rendered and entered by the Board of Tax Appeals.

The petitioners assign as errors the following acts and omissions of the Board of Tax Appeals. The Board erred in holding:
51 1. That petitioners were not dealers in securities under Article 105, Regulation 74, Revenue Act of 1928, and were therefore not entitled to inventory such securities at the end of the fiscal year at market value.

2. That the inventory method may be used by Taxpayers "only in the class of cases where in the opinion of the Commissioner the use of inventories is necessary" and in disregarding and failing to hold that Article 105, Regulation 74, Revenue Act of 1928, is controlling on the Commissioner.

3. That the essentials in the case of James B. Lowell, 30 B. T. A. 1926, and in the instant case are the same, and in failing to distinguish between the facts in the aforesaid case with the facts in the instant case.

4. That the petitioners failed to give detailed evidence as to the operating methods of a specialist in the New York Stock Exchange, which evidence is clearly submitted in items 5 to 11 inclusive of the Stipulation of Facts and in seeking such definition outside of the record.

5. That the Stipulation of Facts setting forth that the firm always had on hand some of the securities in which it specialized was incomplete and misleading. This evidence was clearly submitted in items 12 to 34 inclusive of the Stipulation of Facts, and in Schedule 1 annexed to the Stipulation.

6. That the statement in the Stipulation of Facts "for its own account" is not explained, and in not accepting the ordinary
52 meaning thereof, i. e., buying in their own name, obtaining legal possession and selling in their own name, and acting for themselves as principal and not as broker or agent for others.

7. That under the rules of the New York Stock Exchange a member while acting as broker is prohibited from buying or selling for his own account securities for which he has orders to buy or sell.

8. That the facts in the instant case were materially different from the facts in the Matter of the Estate of Harry E. R. Hall, 29 B. T. A. 1255 (where the Board held that a Specialist on the New York Stock Exchange engaged in the business of buying securities and reselling them to customers was entitled under Article 105, Regulation 74, Revenue Act of 1928, to compute net income upon the basis of inventories at market).

9. In deciding and determining that there are deficiencies of income tax for the year 1931 against petitioner Albert Fried in the sum of $14,238.88 and against Benjamin Einhorn in the sum of $77.82.

Wherefore the Taxpayers petition that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and the rules of said Court and transmitted to the Clerk of said Court for filing, and
53 that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

LEO K. MARTUS,
Attorney for Petitioners,
Office & P. O. Address, 521 Fifth Avenue,
Borough of Manhattan, City of New York.

[Duly sworn to by Albert Fried; jurat omitted in printing.]

54 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Notice for Filing of Petition for Review

To the COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.:

To ROBERT H. JACKSON,
General Counsel, Bureau of Internal Revenue,
Washington, D. C.:

You are hereby notified that Albert Fried and Benjamin Einhorn, the petitioners in the above entitled action, did on the 26th day of February, 1935, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decisions of the Board heretofore rendered in the above entitled consolidated actions.

55 A copy of the petition for review and the assignment of errors as filed is hereto attached and served upon you.

Dated, this 26th day of February, 1935.
Yours, etc.,

LEO K. MARTUS,
Attorney for Petitioners,
521 Fifth Avenue, New York City.

Affidavit of service

State and County of New York, *ss.:*

Tillye B. Aaronson, being duly sworn, deposes and says, that on the 26th day of February, 1935, she served the within Petition for Review and notice of date of filing thereof on Robert H. Jackson, General Counsel to the Respondent in this action, through the post office by depositing a true copy thereof, properly enclosed in a post-paid wrapper in a post office box regularly maintained by the Government of the United States at 521 Fifth Avenue, Borough of Manhattan, City of New York, directed to said Robert H. Jackson, General Counsel, at Bureau of Internal Revenue, Washington, D. C., that being the address designated by him for that purpose.

(Signed) TILLYE B. AARONSON.

Sworn to before me this 26th day of February, 1935.

MORRIS MITCHELL,
Signed MORRIS MITCHELL
Notary Public.

56 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Praecipe for transcript of record

Filed Feb. 27, 1935

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records of the above entitled causes in connection with the petition for review by the said United States Circuit Court of Appeals for the Second Circuit heretofore filed by petitioners, Albert Fried and Benjamin Einhorn:

57 1. Docket entries of the proceedings before the Board.

2. Petition with schedules, and annexed copies of deficiency notice.

3. Other pleadings before the Board, if any.

4. Agreed Stipulation of Facts.

5. Opinion and Decision of the Board.

6. Petition for review together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

7. This praecipe.

Leo K. Martus,
Attorney for Petitioners,
521 Fifth Avenue, New York City.

58 [Clerk's Certificate to foregoing transcript omitted in printing.]

59 In United States Circuit Court of Appeals for the Second Circuit

No. 9—October Term, 1935

Argued Feb. 13, 1935. Decided April 6, 1936

Albert Fried, petitioner

vs.

Commissioner of Internal Revenue, respondent

Benjamin Einhorn, petitioner

vs.

Commissioner of Internal Revenue, respondent

Appeal From the Board of Tax Appeal Before Manton, Swan, and Chase, Circuit Judges

Petitions, consolidated for hearing, to review decisions of the Board of Tax Appeals redetermining deficiencies in income taxes for 1931. Reversed.

Leo K. Martus, of New York City (John J. Curtin, of New York City, of counsel), for Albert Fried and Benjamin Einhorn, copartners doing business under the firm name of Albert Fried & Co.

Frank J. Wideman, Asst. Atty. Gen., and Seawall Key and L. W. Post, Sp. Assts. to Atty Gen.

Opinion

CHASE, Circuit Judge.

Each petitioner is one of the two partners constituting the partnership of Albert Fried & Co., brokers. Each partner owned a membership in the New York Stock Exchange where the firm leased floor space for the transaction of its business during the taxable year. An office was also maintained by the firm at 120 Broadway in New York City.

It was stipulated, inter alia, that during the taxable year 1931, the partnership specialized in thirteen different securities which were traded in regularly on the Stock Exchange. It was customary for it to keep on hand supplies of the shares in which it specialized and to buy and sell such shares as it received orders from other members of the Exchange; its business as the specialist in such stocks being to execute orders at the prevailing market price either for purchase or sale as customers might require. All the stock it bought was actually received by it, and all it sold was delivered. At times it could and did match buying and selling orders. It at all times carried at the end of a month during the year from 10,300 shares to 62,300 shares for resale, and regularly inventoried all unsold securities on hand at market value. The income return of the firm was made upon the basis on which its books were kept, and its practice to inventory securities kept for sale was consistent. During 1931 it sold securities to 431 customers whose purchases ranged from a minimum of 100 shares at a time to 5,700 shares. It bought and sold the greater part of all the shares of stock in which it
60 specialized which were traded on the Exchange in 1931, and often bought or sold to keep the price from fluctuating too widely. Its purchases and sales were frequent, substantial, and regular.

The firm also bought and sold securities in which it was not the specialist, but as to them no claim is made that it was a dealer.

The deficiencies redetermined arose as a result of the refusal of the Commissioner to allow the tax to be computed on the basis of inventories, and were sustained because a majority of the Board decided that petitioners had failed to show that they were dealers in the thirteen different stocks in which the firm specialized and so entitled to the use of inventories in computing taxable income. The decisive question is whether they were dealers entitled to do so under section 22 (c) of the Revenue Act of 1928 (26 U. S. C. A. § 22 and note) and article 105 of T. R. 74.

The above statute required a taxpayer to use inventories whenever in the opinion of the Commissioner their use was necessary in order clearly to reflect taxable income, and when required they were to be taken upon an approved basis "conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income."

Article 105 of T. R. 74 follows:

"Art. 105. Inventories by dealers in securities.—A dealer in securities, who in his books of account regularly inventories unsold securities on hand either—

"(a) At cost;

"(b) At cost or market, whichever is lower; or

"(c) At market value,

may make his return upon the basis upon which his accounts are kept; provided that a description of the method employed shall be included in or attached to the return, that all the securities must be inventoried by the same method, and that such method must be adhered to on subsequent years unless another be authorized by the Commissioner. For the purpose of this rule, a dealer in securities is a merchant of securities, whether an individual, partnership, or corporation, with an established place of business, regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom. If such business is simply a branch of the activities carried on by such person, the securities inventoried as here provided may include only those held for purposes of resale and not for investment. Taxpayers who buy and sell or hold securities for investment or speculation and not in the course of an established business and officers of corporations and members of partnerships who in their individual capacities buy and sell securities, are not dealers in securities within the meaning of this rule."

This regulation recognizes that a taxpayer may be a dealer in some securities and not in others bought or sold. The dealer is one who, having an established place of business, may be said to keep securities as though on his shelves to supply the wants of regular customers as does an established merchant his goods. He is to be distinguished from the speculator in stocks and from the investor. See Harriman National Bank v. Commissioner (C. C. A.) 43 F. (2d) 950, and Seeley 1. Helvering (C. C. A.) 77 F. (2d) 323.

Though the Board of Tax Appeals was divided in opinion on whether the stipulated facts were enough proof of the status as dealers of the petitioners in respect to the stocks in which Fried & Co. specialized and the majority thought not, we believe these facts bring this case within our decision in Commissioner v. Stevens, 78 F. (2d) 713. We can find no material difference whatever between that case and this. Following our decision in the Stevens

Case, we feel bound to hold that the petitioners have shown themselves to be within the scope of the above-quoted regulation and entitled to the use they made of inventories.

Decisions reversed and remanded for further proceedings in accord with the foregoing.

61 In United States Circuit Court of Appeals, Second Circuit

ALBERT FRIED, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment filed April 13, 1936

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is reversed and cause remanded for further proceedings in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

62 [File endorsement omitted.]

63 In United States Circuit Court of Appeals, Second Circuit

BENJAMIN EINHORN, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment filed April 13, 1936

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is reversed and cause remanded for further proceedings in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

64 [File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

66 Supreme Court of the United States

No. 186, October Term, 1936

Order allowing certiorari

Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is advanced and assigned for argument on Tuesday, November 10, next, following Nos. 24, 25, and 26.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

67 Supreme Court of the United States

No. 187, October Term, 1936

Order allowing certiorari

Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is advanced and assigned for argument on Tuesday, November 10, next, following Nos. 24, 25, and 26.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File Nos. 40, 726, 40, 727. U. S. Circuit Court of Appeals, Second Circuit. Term No. 186. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Albert Fried. Term No. 187. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Benjamin Einhorn. Petition for writs of certiorari and exhibit thereto. Filed July 13, 1936. Term Nos. 186 O. T. 1936, 187 O. T. 1936.

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